Supreme Court of the United States

OCTOBER TERM, 1939.

JOHN R. LONGO,
Petitioner,

against

THE STATE OF NEW JERSEY,
Respondent.

BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*.

I.

Opinions of the Courts Below.

The trial court wrote no opinion, but its order denying the new trial petition appears in the record at page 51. The Chief Justice of the New Jersey Supreme Court wrote no opinion, but his ruling appears in the record at page 52. The opinion of the New Jersey Supreme Court is reported in 122 N. J. L. 108 (see also, R. 53-54). The opinion of the New Jersey Court of Errors and Appeals is reported in 124 N. J. L. 176 (see also, R., supplement).

II.

Jurisdiction.

The jurisdiction of the Supreme Court of the United States is invoked under Section 237 (b) of the Judicial Code, and under Rule 38, paragraph 5 (a), of this Court.

The decree appealed from was entered on March 12, 1940 (R., supplement), and the foregoing petition is to be filed on June 12, 1940.

III.

Statement of the Case.

The charge on which petitioner was tried in the State Court was violation of the state election laws by the filing of an allegedly false nominating petition in Hudson County, New Jersey. Because of the nature of that charge, the prospective jurors were questioned as to their political affiliations, and as to their economic interests deriving from those affiliations. No objection was made on behalf of the State to that questioning. The jurors so questioned testified falsely, as is shown by the following analysis of the proofs submitted by both the petitioner and the State:

(a) As to *Arthur R. Flannery:* He denied that he was "related to any public officer" (R. 3). The moving affidavits alleged his uncle Edward Flannery, to be the holder of the elective public office in Hudson County of County Committeeman (R. 33), and his uncle Hubert Flannery to be a Jersey City Police Lieutenant (R. 23). Arthur R. Flannery's affidavit does not mention Uncle Edward at all, but presents the claim that this juror did not consider Uncle Hubert to be a "public officer" because his office was not elective (R. 47).

(b) As to *Edward McLaughlin:* He denied that he had "any relatives who are officers in this county" (R. 3). The moving affidavits showed that his

brother James McLaughlin, with whom he resided, had for five years held the elective office in Hudson County, of County Committeeman, and that his uncle John J. Gildae was a Jersey City Fire Captain (R. 25). His answering affidavit admits that his brother James held the aforesaid public office (R. 44).

(c) As to *Harry M. Asche:* He denied that he had "any relatives who are public officials of this city, or county" (R. 3). The moving affidavits showed that his brother-in-law Joseph Kennedy was a Jersey City Police Sergeant (R. 28). The answering affidavit admits the relationship and does not deny the public office held by Kennedy (R. 49).

(d) As to *David Morrisroe:* He claimed to be employed as a salesman for General Cigar Company, of First Street, New York City (R. 3). The moving affidavits showed that he was employed as a bartender at a tavern connected with a political organization (R. 24), that he had never been employed by General Cigar Company (R. 34), and that that company had never been located at First Street, New York City (R. 35). His answering affidavit does not deny any of those three facts, claims that he testified that the company was located at 41st Street, instead of First Street, and does not show that in fact the company was so located.

It was not argued below, nor is it here, that truthful answers to the questions, showing political or economic connections between the jurors involved and the political party

or faction opposed by petitioner, would necessarily have been ground for challenge for cause. Petitioner's contention was that the jurors were disqualified, not by those connections, but by their own act, their commission of false swearing in regard to the trial and in regard to their fitness to serve as jurors. Petitioner argued that the giving of false testimony in relation to the pending trial was repugnant to the basic concept of jurors and their position in criminal law.

The Court of Errors noted that petitioner by his appeal claimed

> "an invasion of his fundamental rights to a trial by an impartial jury both under the Federal and State Constitution."

but did not in its opinion otherwise refer to that claim.

The State Supreme Court had ruled that the proper method of review was by writ of error, and not by *certiorari*. The Court of Errors specifically refused to rule on this point, but proceeded to consider the meritorious question of fact originally raised by the application for new trial.

The conclusion of the Court of Errors was that the proofs in support of the application for a new trial were insufficient, that in any event they were amply controverted, and that the Trial Court had therefore not abused its discretionary power in refusing a new trial. The petitioner here contends that upon his uncontroverted proof, the Trial Court could not lawfully have denied a new trial and could not lawfully have pronounced judgment, since the verdict

of guilty was shown to have been rendered by an unlawfully-constituted jury.

ARGUMENT.

I.

The Procedure in the State Supreme Court Was Proper.

This point is treated because of the above-stated basis of the State Supreme Court's ruling.

It is fundamental that *certiorari* will lie to review all legal errors of a subordinate tribunal, where no other form of review is available.

> *5 R. C. L. 253, tit. "Certiorari"*, Sec. 5;
> *17 C. J. 16, tit. "Crim. Law"*, Sec. 3265, Notes 96-97;
> *Mellor* v. *Kaighn*, 89 N. J. L. 543;
> *N. J. R. & T. Co.* v. *Saydam*, 17 N. J. L. 25.

The New Jersey Court of Errors has ruled that the granting or denial of a new trial in a criminal case is not reviewable on writ of error.

> *State* v. *Hummer* (1906), 73 N. J. L. 714, 721;
> *State* v. *Pisaniello* (1915), 88 N. J. L. 262, 265;
> *State* v. *Fuersten* (1926), 103 N. J. L. 383, 390.

The New Jersey criminal practice provides for no other specially-stated method of review. Therefore, review of a prejudicial ruling on a new trial application may be had only by *certiorari*, and that is the proper remedy.

II.

The proofs below sustained the charge of false testifying: the holders of public elective offices, and members of city police and fire departments, are public officers.

We again refer this Court to the analysis of the proofs of false testifying. Further analysis of the testimony below will not be made, except as to the meaning of "public officer". It was urged below that three of the four jurors in question testified falsely to questions involving their connection with "public officers". That term has been defined as follows:

> "OFFICE
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> "An 'office' is defined to be a public charge of employment, and he who performs the duties of the office is an officer.
>
> "The term 'office' in the constitutional sense, implies an authority to exercise some portion of the sovereign power, either in making, executing or administering the laws."
>
> "PUBLIC OFFICE. The right, authority, and duty created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of government for the benefit of the public."
>
> "Where, by virtue of law, a person is clothed, not as an incidental or transient authority, but for such times as denotes duration and continuance, with independent power to control the property of the public, or with public functions to be exercised in

> the supposed interest of the people, the service to be compensated by a stated yearly salary, and the occupant having a designation or title, the position so created is a public office." *Black's L. Dic.* (3rd Ed.), 1284, 1285.

The New Jersey Court of Errors and Appeals has held that even a notary public, by reason of the duties to be exercised by him for the general public, is a "public officer".

> *Kip* v. *Peoples Bank & Trust Co.*, 110 N. J. L. 178.

As for police officers, the New Jersey Supreme Court has held it to be ' well settled" that they are "public officers".

> *Speck* v. *Fairview*, 7 N. J. Mis. 410, (1929) *and cases therein cited.*

Under these decisions the County Committeemen related to Jurors Flannery and McLaughlin, the Police Lieutenant who was uncle to Juror Flannery, the Fire Captain who was uncle to Juror McLaughlin, the Police Sergeant who was brother-in-law to Juror Asche, were public officers.

III.

Petitioner was denied due process in that the verdict of his guilt was rendered by jurors who had testified falsely on *voir dire* examination, and who were thereby disqualified from rendering any verdict.

It is fundamental that when a prospective juror testifies falsely on examination as to his qualifications for jury service, he thereby automatically disqualifies himself.

16 C. J. 1159, tit. "Crim Law", Sec. 2665;
46 C. J. 94, tit. "New Trial", Sec. 51;
20 R. C. L. 242-3, tit. "New Trial", Sec. 27;
Knights of Pythias v. *Steele*, 107 Tenn. 1;
Hyman v. *Eames*, 41 Fed. 676;
State v. *Wright*, 112 Iowa 436;
State v. *Latham*, 124 La. 876;
Jones v. *State*, 97 Miss. 269;
State v. *Taylor*, 64 Mo. 358;
Spielter v. *No. German Lloyd*, 259 N. Y. S. 356, 232 App. Div. 104;
Romesbera v. *Merrill*, 99 Pa. Super. Ct. 197;
Pearcey v. *Michigan Mutual Life Ins. Co.*, 111 Ind. 59;
State v. *Lauth*, 46 Ore. 342;
Cupps v. *State*, 120 Wis. 504.

The disqualification appears, by the foregoing authorities, to rest upon the constitutional ground of impairment of the right to trial by an impartial jury, and impairment of the right to challenge, peremptorily or for cause.

This Court has held, in construing the meaning of "due process" under the Fifth Amendment that it requires that all rules of practice in impanelling a jury must necessarily be adapted to secure the rights of the accused.

Lewis v. *U. S.*, 146 U. S. 377,

and again, that it requires criminal trials to be had in accordance with the settled course of judicial proceedings.

Palko v. *State of Connecticut*, 302 U. S. 319.

While we find no ruling that the provisions of the *Fifth Amendment* apply to states, this Court has ruled that the *Fourteenth Amendment* has bound the states by the same requirements as were applied to the federal government by the earlier amendment.

Southwestern Oil Co. v. *Texas*, 217 U. S. 114.

We have found no New Jersey cases directly dealing with the effect of the above-discussed type of misconduct of a juror in criminal proceedings. Reference to the general body of law throughout the states, based upon well-established principles of jurisprudence, reveals an almost unanimous consensus in favor of the disqualification here urged. That disqualification was required, in accordance with "the settled course of judicial proceedings".

See, *Palko v. Connecticut, supra.*

IV.

Petitioner was denied the equal protection of the laws in violation of the Fourteenth Amendment.

The New Jersey Constitution guarantees that the right to trial by an impartial jury shall remain inviolate.

New Jersey Constitution, Article 1, Sections 6, 7. [4]

This provision permits unlimited challenges for cause.

The New Jersey statutes, in effect at the time of the trial below, allowed petitioner 10 peremptory challenges to the jury.

New Jersey Revised Statutes, 2:92-7. [4]

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[4] Quoted in full in Appendix 1, *infra.*

The indictment charged petitioner with having filed a false nominating petition in violation of the state election laws (R. 2, 10). The question, not of mere political affiliation, but of political connection resulting in such enonomic interest as would cause bias, was therefore of importance in respect to each juror. Petitioner was justified, at the time of the examination, in accepting the jurors' answer on this point as truthful. By their false answers the four jurors indicated that there was no occasion for challenge either peremptorily or for cause. The State Court's refusal, upon proof of the falsity, to rule that the jurors were disqualified, was therefore an impairment of petitioner's right to trial by jury, and an impairment of his right to challenge.

State v. *Lauth, supra;*
Jones v. *State, supra;*
State v. *Taylor, supra;*
Knights of Pythias v. *Steele, supra.*

Thus, the benefits and guarantees of the constitutional and statutory provisions above cited were not allowed to him, in violation of the guaranty of the equal protection of the laws, contained in the Fourteenth Amendment.

Conclusion.

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers to the end that basic rights under the Constitution of the United States may be preserved, and accordingly that a writ of *certiorari* should be granted, and that this Court should review and reverse the decision of the Court of Errors and Appeals of the State of New Jersey.

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